84-1760

No. .....

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In The

Supreme Court of the United States

October Term, 1984

—o—

DR. SALVADOR CANALE

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

PETITION FOR A WRIT OF CERTIORARI

—o—

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FIFTH CIRCUIT'S APPLICATION OF 18 U.S.C. 3143(B) (2) IS IN CONFLICT WITH THE INTERPRETATION GIVEN THE STATUTE BY THE THIRD AND NINTH CIRCUITS AND DOES THE INTERPRETATION APPLIED BY THE FIFTH CIRCUIT VIOLATE THE FIFTH AND EIGHTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

II. WHETHER 18 U.S.C. 3143 MAY BE APPLIED RETROACTIVELY TO OFFENSES ALLEGEDLY OCCURRING PRIOR TO THE DATE OF ENACTMENT WITHOUT VIOLATING THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

PARTIES TO THE PROCEEDING BELOW

All parties appear in the caption of the case in the United States Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

The above named petitioner, Dr. Salvador Canale, pursuant to the provisions of Section 1254(1), Title 28, United States Code, and Rule 20.1 of the United States Supreme Court, herein applies for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit, rendered on March 28, 1985. (See Appendix A). That decision denied petitioner's application for Rehearing of Application for Writ of Mandamus, Application for Rehearing of Application for Bond Pending Appeal, and Motion to Stay Incarceration Pending further proceedings.

I.
ORDER AND OPINION BELOW

On March 28, 1985, after deliberating for over a month, the United States Court of Appeal for the Fifth Circuit upheld a decision of the district court judge, the Honorable Peter Beer, which denied petitioner's Application for Rehearing of: Application for Writ of Mandamus; Application for Bond Pending Appeal; and a Motion to Stay Incarceration pending further proceedings. There were three issues presented to the Fifth Circuit. The first issue was whether 18 U.S.C. 3143 (hereinafter the Bail Reform Act of 1984) required the trial judge to admit he has allowed reversible error to occur in order to allow the accused to remain on bond pending appeal. The second issue was whether the Bail Reform Act violates the Fifth and Eighth Amendments to the United States Constitution if the interpretation given this statute by the district court is correct. And the third issue presented was whether a district court judge may retroactively apply the Bail Reform Act to offenses allegedly occuring prior to the effective date of enactment

without violating the Ex Post Facto Clause of the United States Constitution. The section of the Bail Reform Act pertinent to the instant case changes the standards to be applied to post-conviction bail from those of a "merely frivolous" appeal to one which places a burden on the defendant to show that the appeal "raises a substantial question of law or fact likely to result in reversal or a new trial".

II.
STATEMENT OF THE CASE

On March 20, 1984, petitioner, Dr. Salvador Canale, was indicted on two counts of violating 18 U.S.C. 1962 and one count of violating 18 U.S.C. 1952. The indictments arose out of events allegedly occurring in December of 1979 and February and March of 1981. The indictments constituted one segment of *U.S. v. Provenzano, et al.*, Docket Number 84-103, Section "M" of the United States District Court for the Eastern District of Louisiana. At his arraignment on March 22, 1984, Dr. Canale pled not guilty to the charges contained in the indictment and was released on a $50,000.00 personal appearance bond. His bond in this matter was set pursuant to the Bail Reform Act of 1966, former 18 U.S.C. 3141 et seq.

Prior to trial, Dr. Canale and the other defendants in this case submitted in excess of sixty pre-trial motions. The trial itself stretched from December 3, 1984 until December 21, 1984. By any standard, the case was an extremely complex one, presenting numerous legal and factual problems.

On December 21, 1984, the jury convicted Dr. Canale on the two counts of violating 18 U.S.C. 1962. Following the conviction, the District Court allowed Dr. Canale to remain on his original bond pending sentencing.

In a minute entry dated January 2, 1985, the District Court advised all counsel of its intent to apply the provisions of the Bail Reform Act of 1984 to the defendants following sentencing. (Appendix B). In response to this minute entry, counsel for petitioner submitted a Motion and Memorandum to Remain on Bond Pending Appeal. In addition and in the alternative to the above motion, counsel for petitioner submitted a Motion For Self Surrender. The above motions were heard by the District Court during the sentencing hearing held on January 23, 1985. The transcript of this hearing is attached to co-defendant Crabtree's petition (which is consolidated with this case) as Crabtree Appendix D. Notice of Appeal is attached hereto as Appendix C.

At the sentencing hearing, the District Court granted the Motion For Self Surrender brought by petitioner and allowed him to remain free on his original bond until February 6, 1985, the date set for self-surrender. However, the District Court denied the Motion to Remain on Bond Pending Appeal brought by petitioner. As set forth in the arguments below, the District Court retroactively applied the provisions of 18 U.S.C. 3148 in an attempt to justify denying bond pending appeal. Though the District Court found that Dr. Canale was not likely to flee or pose a danger to the community, the Court held that it did not find that the case generated "any issues raising a substantial question of law or fact likely to result in reversal or an order for a new trial." Therefore, pursuant to 18 U.S.C. 3143 (b)(2) the District Court refused to allow petitioner to remain on bond pending appeal in a ruling dated January 25, 1984. (Appendix D).

Following these rulings, petitioner brought a Motion to Stay the self-surrender order noted above pending the

resolution of supervisory writs to the United States Court of Appeals for the Fifth Circuit. This motion was denied by the District Court on January 30, 1985. (Appendix E).

On January 30, 1985, counsel for petitioner brought an Application For Writ of Mandamus, or in the alternative, an Application For Bond Pending Appeal, or, in the alternative, a Motion to Stay Self-Surrender Order, before the United States Court of Appeals for the Fifth Circuit. These Applications and Motions were denied without setting forth reasons by a Panel of the Fifth Circuit Court of Appeal on February 4, 1985. (Appendix F).

On February 20, 1985, counsel for petitioner brought an Application for Rehearing of Application for Writ of Mandamus or, in the alternative, Application for Rehearing or Application for Bond Pending Appeal, or, in the alternative, a Motion to Stay Imposition of Incarceration Pending Determination of Petition of Certiorari, Appeal and Motion to Remain on Bond Pending Appeal by the United States Supreme Court before the United States Court of Appeals for the Fifth Circuit. After deliberating for over a month these Applications and Motions were denied on March 28, 1985. (Appendix A).

III.

STATEMENT OF RELIEF SOUGHT

Petitioner seeks an Order of this Honorable Court reversing the district court's denial of his Motion to Remain on Bond Pending Appeal, and releasing him on bond pending the appeal of his conviction by properly interpreting Section 3143(b)(2) of the United States Code.

Alternatively petitioner seeks to have this Honorable Court issue a writ of mandamus to the District Court

ordering the court to reconsider the Motion to Remain on Bond Pending Appeal of petitioner in light of the proper interpretation of 18 U.S.C. 3143(b)(2) as expressed in *United States v. Handy*, —F.2d— (9th Cir. 2/20/85 No. 85-3001) and *United States v. Miller*, 753 F.2d 19 (3rd Cir. 1985). Should this Honorable Court find the Bail Reform Act of 1984 inapplicable to the instant case as violative of the Ex Post Facto Clause of the United States Constitution, it is urged that this Honorable Court issue a writ of mandamus to the District Court to reconsider the Motion to Remain on Bond Pending Appeal of applicant in light of the statute in effect at the time of the purported offense. In the alternative, should this Honorable Court find that the District Court and the Court of Appeals properly interpreted the Bail Reform Act of 1984, then the statute is unconstitutional and should be given no force and effect.

IV.

REASONS WHY WRIT SHOULD ISSUE

On January 23, 1985, the date of petitioner's sentencing and the filing of his Motion to Remain on Bond Pending Appeal, the district court judge stated that he was solely concerned with the provisions of Section 3143(b)(2), the Bail Reform Act of 1984, which changes the standard for remaining free on bond during the pendency of an appeal from a determination by the trial court that the appeal was "merely frivolous" (18 U.S.C. 3148) to one which places a substantial burden on the defendant to show that the appeal raises a "substantial question or fact likely to result in reversal or an order for a new trial". 18 U.S.C. 3143(b)(2). (See co-defendant Crabtree's Appendix D, page 52). The district court's opinion at Appendix E addresses that section of the law, making it clear that its

decision to deny petitioner bail pending appeal rested solely on its interpretation of that section. In sum, the district court states that it "did agree in all respects with their (the jury's) verdict as to each count involving each defendant . . ." and then stated:

> "I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal. Nor were there any substantial questions of law or fact which will result in an Order for a new trial." (Appendix D page 2).

On the basis of this observation, that the district court denied petitioner's Motion For Bail Pending Appeal. The judge continued in that ruling:

> "Congress has done on more (and no less) than to conclude, in their legislative wisdom, that judicial officers shall order a person who has been found guilty of an offense and sentenced to a term of imprisonment and who has filed an appeal (or a Petition for Writ of Certiorari) to be detained unless the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial. Having here made the determination that such is not here, the case, defendant's motion for bail pending appeal must be denied." (Appendix D, page 4).

It is noteworthy that the trial court had just denied various and numerous motions in arrest of judgment and motions for a new trial filed by the various defendants.

Thus, the trial court judge made a ruling that he found no substantial questions of law raised at the trial of the matter. At the same time as he denied all defendants' requests of post-conviction relief. It is submitted that to do otherwise would have been illogical on his part. The U.S. Court of Appeals for the Fifth Circuit then held that

the Bail Reform Act may be applied retroactively, holding that the law was procedural rather than substantive.

Though the Fifth Circuit agreed with the test expressed by the Third and Ninth Circuits in *Miller* and *Handy,* they did not apply it to the instant case. The test applied by the district judge was:

> " . . . there is not any issue existent in this matter, right now, that I believe is likely to result in reversal, or an order for a new trial." (See Co-defendant Crabtree's Appendix D, page 48).

As set forth in the arguments below, petitioner respectfully contends that the standard to remain on bond pending appeal that was applied by the District Court and the Court of Appeals is unconstitutional as violative of petitioner's rights under the Fifth Amendment, Eighth Amendment and/or the Ex Post Facto Clause of the United States Constitution.

Based on the holdings of the United States Court of Appeals for the Fifth Circuit in both the instant case and *United States v. Crabtree,* —F.2d— (5th Cir. 2/22/85, No. 85-3050), which was not overruled by the instant case, petitioner respectfully submits that the Fifth Circuit has only superficially applied the standard of *Miller* and *Handy,* robbing the standard of any meaning. This superficial application of the correct standard has severely infringed petitioner's constitutional rights as petitioner is currently incarcerated in violation of these rights in the Federal penitentiary in Latuna, Texas.

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ISSUES PRESENTED

I.

Whether The Fifth Circuit's Application Of 18 U.S.C. 3143(B) (2) Is In Conflict With The Interpretation Given The Statute By The Third And Ninth Circuits And Does The Interpretation Applied By The Fifth Circuit Violate The Fifth And Eighth Amendments Of The United States Constitution.

II.

Whether 18 U.S.C. 3143 May Be Applied Retroactively To Offenses Allegedly Occurring Prior To The Date Of Enactment Without Violating The Ex Post Facto Clause Of The United States Constitution.

———o———

ARGUMENT

On October 12, 1984 the President signed into effect Public Law No. 94-473, 98 Stat. 1837. Title II of that Public Law bears the popular name "Comprehensive Crime Control Act of 1984." Chapter I of that act includes substantial revisions of the law governing bail and is referred to as the "Bail Reform Act of 1984." Included in the Bail Reform Act of 1984 are substantial revisions of the law governing bail pending appeal. The new law provides that bail shall be denied pending appeal unless the Court finds:

> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . .; and
>
> (2) that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial 18 U.S.C. Section 3143 (b).

Prior to this amendment, bond pending appeal could be denied only if "a risk of flight or danger . . . is believed to exist, or if it appears that any appeal is frivolous or taken to delay . . ." 18 U.S.C. Section 3148.

Former F.R.A.P. 9(c) made it clear that the burden was on the applicant to establish the absence of a likelihood of flight or danger, the burden of establishing that the appeal was frivolous or merely dilatory rested with the Government The new F.R.A.P. 9(c) expressly incorporates the provisions of new 18 U.S.C. 3143. Therefore, the arguments herein are equally applicable to new F.R.A.P. 9(c).

Because the Bail Reform Act of 1984 has only been in effect since October 12, 1984, there are very few published opinions dealing with the application of the pertinent amendments to offenses pre-dating the effective date of the amendments or with the proper interpretation of 18 U.S.C. Section 3143 (b)(2). Since the hearing on the Motion to Remain on Bond Pending Appeal and subsequent to the Application for Writ of Mandamus, petitioner has uncovered several cases dealing with the new Bail Reform Act. These cases will be dealt with in the arguments set forth below.

In open court, the District Judge made it clear that he did not consider petitioner or any of his co-defendants likely to flee or pose any danger to the community. (Transcript of Hearing, 1/23/85, pages 37 - 40, and pages 48 - 50, See co-defendant Crabtree's Appendix D). In response to a question posed by counsel for petitioner, the Court made it clear that its ruling on petitioner's motion would be based solely upon the Court's interpretation of 18 U.S.C. Section 3143 (b)(2). (Transcript of Hearing, Id. at pages

39 - 40). Paragraph (1) of the statute is, therefore, not in dispute. Such a finding is further supported by the fact that Dr. Canale was allowed to remain on bond pending sentencing and has reported to the institution where he is incarcerated without any unlawful delays.

I.

The Fifth Circuit's Application of 18 U.S.C. 3143 Is In Conflict With The Interpretation Applied By The Third And Ninth Circuits And The Fifth Circuit's Application Of The Statute Violates The Fifth And Eighth Amendments Of The United States Constitution.

18 U.S.C. 3143 (b)(2) provides that an accused seeking bail pending appeal must demonstate that:

> ". . . the appeal is not for purpose of delay and raises a substantial question of fact or law likely to result in reversal or an order for a new trial."

The District Court signified its intention to apply the above provision to the applicant in a minute entry date January 2, 1985. (Appendix B). Due to the tenor of this minute entry and the subsequent statements made by the District Court, it is clear that the District Court interpreted the above provision to in effect preclude bail pending appeal. During the hearing on the Motion To Remain On Bond Pending Appeal brought by applicant, the District Court stated that:

> "Well, that's a strong test. [referring to the standard set forth in 18 U.S.C. 3143 (b)(2).] About the closest thing I can think of in terms of this whole situation is the situation involving, as I noted in my minute entry, the pertinent portion of the comprehensive Crime Control Act says, that the appeal is not for the purpose of delay and raises the substantial question of law, or

fact, likely to result in reversal, or an order for a new trial. Now, that, all of us have to acknowledge, I think, is very compelling language, and any district judge ought to be able to read that and understand what the Congress meant by that enactment.

I would say that there is not any issue existent in this matter, right now, that I believe is likely to result in reversal, or an order for a new trial.

I will say in recognition of Mrs. Schlueter's excellant argument, that probably the closest call would, perhaps, be the one with respect to the severance of the two non RICO defendants. But, if I thought it was likely to result in reversal, then I would have ordered the severance. I made the decision not to order the severance, I noted on the record that it was the government's prerogative to go ahead and go to trial in the context or composition that they had indicated and I did indicate that some reviewing court might have to take a look at that. But, my opinion of it was that the government's position was more likely correct than incorrect, and accordingly, did not order the severance.

Now, Ive got to say that there isn't any issue existing at this time, which I perceive to be responsive to the conditions that are imposed by this provisional of the law, and as Congress has, in their wisdom, seen fit to enact." (Transcript of hearing of 1/23/85, pp. 47-48, lines 20-25, and 1-20, see co-defendant Crabtree's Appendix D).

From the above language, it is clear that the District Court interpreted the Bail Reform Act of 1984 to require it to admit that it had allowed reversible error to occur during the trial. Petitioner respectfully submits that this cannot be the constitutional standard for bond pending appeal.

The United States Third Circuit Court of Appeals considered a similar interpretation of 18 U.S.C. 3143(b)(2)

in *U.S. v. Miller*, 753 F.2d 19 (3rd Cir. 1985). In *Miller*, the District Court had denied bail pending appeal after concluding that the new Act required the trial judge to find that one or more of its orders was likely to be reversed on appeal in order to permit bond pending appeal. The Third Circuit reversed and remanded the decision, reasoning that:

> "Our task is to give a reasonable construction to the statutory language in a manner that effectuates the congressional intent. Under the new act, after first making the findings as to flight, danger, and delay, a court must determine that the question raised on appeal is a "substantial" one, i.e. it must find that the significant question at issue is one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful. This represents a marked change in the inquiry into the merits in the context of a bail determination, since the 1966 act only required the court to determine whether the issue was "frivolous" see 18 U.S.C. 3148 (repealed by 1984 Act).
>
> After the court finds that the question on appeal meets the new "substantial" test, it must determine whether that issue is sufficiently important to the merits that a contrary appellate ruling is likely to require reversal or a new trial. The statutory language requiring a finding that the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial" cannot be read as meaning, as the district court apparently believed, that the district court must conclude that its own order is likely to be reversed.
>
> In the first place, such a reading would render language in the statute surplusage because every question that is likely to be reversed must by definition be "substantial". In the second place, we are unwilling to attribute to Congress the cynicism that would underlie the provision were it to be read as requiring

the district court to determine the likelihood of its own error. A district judge who, on reflection, concludes that she/he erred may leave substantial errors uncorrected, or deliberately misconstrue applicable precedent. Thus, it would have been capricious of Congress to have conditioned bail only on the willingness of a trial judge to certify his or her own error.

For a similar reason, the phrase "likely to result in reversal or an order for a new trial" cannot reasonably be construed to require the district court to predict the probability of reversal. The federal courts are not to be put in the position of "bookmakers" who trade on the probability of ultimate outcome. Instead, that language must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal. A question of law or fact may be substantial but may, nonetheless, in the circumstances of a particular case, be considered harmless, to have no prejudicial effect, or to have been insufficiently preserved. A court may find that reversal or a new trial is "likely" only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial." Id at pp. 8-10.

The Court in *Miller* went on to set forth the following four factor test to be used in determining the right of a criminal defendant to remain on bond pending appeal:

1.) That the defendant is not likely to flee or pose a danger to the safety to any other person or the community if released;

2.) That the appeal is not for purpose of delay;

3.) That the appeal raises a substantial question of law or fact; and

4.) That if the substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new

trial of all counts on which imprisonment has been imposed. Id at p. 11.

The United States Ninth Circuit Court of Appeals has recently considered the interpretation of 18 U.S.C. 3143(b)(2) in *United States v. Handy,* —F.2d—, (9th Cir. 2/20/85, No. 85-3001). The Ninth Circuit says that the term "substantial" merely defines the level of merit of the issue raised by the appellant, while the "likely to result in reversal" language defines the type of question that must be presented. Thus, the Court explains, the Act simply requires the defendant to show the existence of a substantial question of the type that calls into question the validity of the judgment.

The Third Circuit in *Miller* and the Ninth Circuit in *Handy* interpreted the statute in a clear and sensible manner. Bail on appeal, though not an absolute constitutional right is an important right necessary to preserve the individual rights enumerated in the Bill of Rights. Indeed, modern federal courts have recognized that the right to bail underlies the entire structure of constitutional rights enumerated in the Bill of Rights. *Stack v. Boyle,* 342 U.S. 1 (1951) at 4; *United States v. Abraham,* 604 F.2d 386 (5th Cir. 1979) at 373; *United States v. Meinster,* 481 F.Supp. 1117 (1979).

The Eighth Amendment to the United States Constitution is therefore an integral part of due process of law under both the Fifth and Fourteenth Amendments. Since the Eighth Amendment prohibits excessive bail, a fortiori, the Amendment forbids denying bail altogether in the absence of legitimate reasons. *United States ex rel Goodman v. Kehl,* 456 F.2d 863 (2nd Cir. 1972) at 868; *Carlson v. London,* 342 U.S. 524 (1952) in dissenting opinions by

Justices Burton and Black. Therefore, in order to comply with notions of due process, Congress and the State Legislatures cannot arbitrarily and/or capriciously deny bail.

Since the District Court in the instant case interpreted the statute to require an "issue . . . that I believe is likely to result in reversal, or an order for a new trial", (Transcript of hearing 1/23/85, pp. 47, 48, lines 20-25, see co-defendant Crabtree's Appendix D), it is clear that this is not the logical interpretation expressed by the Third and Ninth Circuits in *Miller* and *Handy*. Moreover, it is clear that Congress did not intend to limit bail pending appeal to cases in which the defendant can demonstrate at the outset of appellate proceedings that the appeal will probably result in reversal or an order for a new trial. The legislative history states that the purpose of the statute is to require "an affirmative finding that the chance for reversal is substantial". S.Rep.No. 98- 225, 98th Cong. 2d Sess. 23, reprinted in U.S. Code Cong. and Ad. News 2,30. A showing that the chance of reversal is substantial is, of course, very different from a showing that reversal is more likely than not.

The Fifth Circuit Court of Appeals has "agreed" that the statute does not require the judge to certify his own commission of reversible error in order to allow a defendant to remain on bond pending appeal. The Fifth Circuit went on to state:

> "the statutory reference is to a presence in the case of at least one fairly debatable or substantial issue of the type that calls in serious question the correctness of the judgment of conviction." *(U.S. v. Canale,* — F.2d —, No. 85-3052, 3/28/85).

However, the Fifth Circuit has not applied this interpretation to the instant case nor did they overrule Chief Judge

Clark's interpretation of the statute in *United States v Crabtree,* — F.2d —, (No. 85-3050, 2/22/85). In *Crabtree,* Chief Judge Clark specifically stated that:

> "Crabtree has failed to carry the burden imposed on him to show that his appeal is likely to result in reversal or a new trial order." Id. at pg. —.

Judge Clark went on to state:

> "Since Crabtree has not produced such a (proper) transcript or (stipulated factual) record, he has failed to demonstrate that the issues he seeks to raise are likely to result in reversal of the conviction and sentence or in an order for a new trial." Id. at —.

It is readily apparent that the Fifth Circuit could not has possibly applied the interpretation of the Bail Reform Act to the instant case or to *Crabtree.* Though facially aligning themselves with the Third and Ninth Circuits they have refused to apply the proper interpretation to the instant case and have not overruled the holding in Crabtree. As set forth in the arguments below, it should be readily apparent that there is not one but several "substantial issues of the type that calls into question the validity of the judgment".

Wherefore, applicant respectfully requests this Honorable Court to remand this case to the United States District Court for the Eastern District of Louisiana, Section "M" in order that the Court below can rule on the Motion to Remain on Bond Pending Appeal pursuant to the only proper interpretation of 18 U.S.C. 3143.

In the alternative, it is urged that this Honorable Court order applicant released on bond pending appeal on the basis of Rule 9 of the Federal Rules of Appellate Procedure. The following information is offered in conformity with Local Rule 9.2.

As discussed in great detail above, the test set forth in 18 U.S.C. section 3143(b) is two-fold. First, it must be found that the accused is not likely to flee or pose a danger to any person or to the community. Second, it must be determined that the appeal is not merely dilatory but raises substantial questions of law or fact likely to result in reversal.

As pointed out above, the District Court resolved the first part of the test in favor of granting applicant bond pending appeal. For the purposes of this application de nova, the personal considerations relative to Dr. Canale are restated.

Dr. Canale is an intelligent, compassionate, and exceptional man. Beginning with achieving the valedictorian position of his graduating class at St. Aloysius High school up to his present status as one of the finest thoracic surgeons in the community of Las Vegas, Nevada, Dr. Canale has lived a lifetime devoted to academic and professional excellence. He owns his own home in Las Vegas, Nevada and has resided there since 1979. He has raised 6 children, and currently supports and resides with his seventeen year old son. He is presently putting two older sons through college at the University of Nevada at Las Vegas. Up to the time of these proceedings he served as the physician for the Nevada State Department of Corrections, Southern District. In addition to this position, he served as director of the Nevada State Blood Bank Program. Both of these institutions await his immediate return pending the resolution of this matter.

In addition to his impeccable professional record, Dr. Canale has consistently demonstrated an unwavering commitment to his fellow man. The number of individuals ow-

ing their life and health to his untiring and selfless work is truly legion. Therefore, as the District Court has already held, any allegation that Dr. Canale will flee or pose a danger to any individual is clearly unfounded. In contrast his history and current status unequivocally demonstrate that his freedom pending appeal can only result in invaluable benefits to individual citizens and the community.

The second part of the two prong test requires that the appeal not be taken as a dilatory tactic and that it raise substantial issues likely to result in reversal.

A preliminary review of the record in this matter indicates that there are a number of issues which, when presented on appeal, will present a substantial likelihood of reversal.

1. Denial of Motion to Dismiss Indictment

Prior to trial, applicant moved to dismiss the indictment. It was alleged in that motion that the indictment failed to comply with Rule 7(c)(1), F.R. Crim. P. in that it included as a predicate offense under 18 U.S.C. Sec. 1962(c) a conspiracy to commit arson.

An essential element of a section 1962(c) offense is that the defendant participate in the affairs of the enterprise "through a pattern of racketeering." Section 1961(s) describes a pattern of racketeering to include "at least two acts of racketeering". The statute specifies the crimes which qualify as racketeering acts, including "any act or threat involving . . . arson . . ." 18 U.S.C. Sec. 1961 (1) (a).

As will be pointed out more fully to this Court on appeal, it is clear that Congress intended to punish only completed acts or threats when the pattern of racketeering

activity was proven by state substantive offenses under Section 1961 (1)(a). In the case at hand, the predicate state offense was the inchoate offense of conspiracy to commit arson. That offense requires no act or threat and, therefore, does not qualify as a predicate offense.

The issue raised by the denial of the motion to dismiss, therefore, is a substantial one, of the type that calls into question the validity of the judgment.

2. Denial of Motion in Limine

Prior to trial, applicant made a motion in limine seeking to exclude any reference at trial to Carlos Marcello. Marcello, a convicted felon having great notoriety as a result of a widely held public perception that he is a leader of an organized crime organization, was in no way connected in any relevant or probative manner to any of the events or persons involved in the proceedings. The very mention of his name, therefore, was correctly predicted to have an overriding prejudicial effect. Due to the denial of the motion in limine, counsel for the government was able to make numerous irrelevant references to Carlos Marcello. The prejudice to applicant resulting from those references clearly constitutes grounds for reversal.

3. Prosecutorial Misconduct

Throughout the trial, counsel for the government persisted in improper questioning and making uncalled for and prejudicial remarks during closing argument. The acts complained of were objected to but all objections were overruled. The cumulative effect of such misconduct was prejudice of such a great degree as to create a substantial likelihood of reversal on appeal.

a). During closing argument, the prosecutor called applicant "nothing more than a wife-beater."

b). The prosecutor had to be reprimanded for unnecessary *ad hominem* attacks upon defense counsel.

c). Irrelevant and highly prejudicial comments were made by the prosecutor stressing a connection between events in this case and Carlos Marcello.

d). During cross-examination of defendant, the government, over defense objection, used a nolo contendere plea in a state court entered in abscentia to a misdemeanor to impeach the defendant.

e). Throughout the trial, the government was permitted to make reference to the prosecutorial team as part of the Organized Crime Strike Force. Those references gave jurors an inflated perception both as to the importance of the prosecutors and the significance of the offenses charged.

4. Prejudicial Comments Made by the Court

In attempting to determine if any of the jurors had read that morning's newspaper article dealing with the conviction of co-defendant Provenzano in a prior trial, Judge Beer included the following remarks in his comments:

> "The newspaper article makes reference with respect to Mr. Provenzano, of another case that had been before this Court."
>
> (Transcript of Proceedings, 12/5/84 p. 7, lines 8-10, Appendix G).
>
> "And I want to instruct you in the strongest possible terms to disregard any reference to any other event or events as they have to do either with Mr. Provenzano, or any other defendant in the case."
>
> (Transcript of Proceedings, 12/5/84, p. 7, lines 13-17, Appendix G).

". . . disregard any reference whatever it may be, in the newspaper, television, radio, et cetera, with respect to any other alleged, or proposed, or contended activities on the part of any of these defendants in every respect."

(Transcript of Proceedings, 12/5/84, p. 8, lines 1-5, Appendix G).

"But most important, of course, is to follow my very strong admonition to you not to in any way be effected by, or consider, or even take into account other events involving any of these defendants as they have to do with other contentions, other findings in other proceedings whatsoever."

(Transcript of Proceedings, 12/5/84, p. 9, lines 16-21, Appendix G).

After repeated requests by defense counsel to question the jury panel individually as to whether they had read the article in question, Judge Beer agreed, dismissed all of the jury except for Ms. Bailey and then proceeded to question her in the following manner:

The Court: I'm going to ask you some questions. I want to check with you to satisfactory myself of a couple of points. *Did you recall if you noticed in the article, the article made reference to another trial, another conviction with respect to Mr. Provenzano.*

Juror Bailey: I don't remember.

The Court: You don't remember. If indeed it did, and you happened to have read it, would that in anyway affect your ability to fairly and impartially hear and decide this case?

Juror Bailey: No, it won't.

The Court: Any other questions.

Mr. Fanning: I'd like to ask the juror if she discussed the article with anyone else, including any of the jury.

The Court: Did you discuss that article with any other members of the jury?

Juror Bailey: No, I did not.

The Court: Thank you, Miss Bailey, would you ask Miss Volintine if she would step in a minute.

(Whereupon, Juror, Bailey exited the courtroom.)

Mr. Capitelli: Before the next juror comes in, I would like to ask the Court not to reference the point in the article. I think that has an effect on all the people involved.

The Court: I don't understand what you mean.

Mr. Capitelli: I withdraw it.

Ms. Bitzer: We agree with that. I understand what he is saying, that the Court would not pinpoint the specific case. More particularly, whether or not there was a conviction, as a matter of fact. Just whether or not they read it, if it would effect it would have on them.

The Court: I am going to try to do this the way all of you want to. I don't have the forum in prospective, as much as I do the necessity of a fair trial. And as far as I am concerned, the verbage that somehow, apparently effects everyones thinking, because the Fifth Circuit pronounces some existing attitude of the manner these things have to be addressed, doesn't concern me as much as being sure I satisfactory myself as a United States District Judge these people are going to have a fair trial at the hands of this jury, than some rote adherance to some specific verbage announced by some panel of the court of appeal. Go ahead call the next juror.

(Transcript of Proceedings December 5, 1984, p. 11, lines 13-25, p. 12, p. 13, lines 1-7, Appendix G).

After these obviously prejudicial comments, Judge Beer allowed Ms. Bailey to return to the jury panel where she remained throughout the day. The next morning, after a request from the United States Attorney's office, Judge Beer agreed to dismiss Ms. Bailey. The Judge still did not believe he had tainted her or, more importantly, that she

had tainted the rest of the jury after he had allowed her to return to the jury panel. That day, prior to summoning the jury Judge Beer stated:

> ". . . . it was perfectly clear to me, absolutely categorically clear on the face of the discussion with Miss Bailey, there was absolutely no basis whatsoever for her to be excused. It was positively clear to me that she had not, in any way, been influenced by the article. Indeed, it was absolutely clear that that was not the case, that it had no effect on her whatsoever, and yet I am now, confronted with a request by the U.S. Attorney's Office to remove Miss Bailey from the jury. Now, because of the apparent concern on the part of the U.S. Attorney's Office with respect to this one particular juror or actually, if the truth be known, the concern from the U.S. Attorney's Office that some appellate panel might take umberage at the process that the court instituted as a United States District Judge concerned not with the rote business of verbage but with the actual determination of whether or not there had been any possibility of any prejudge whatsoever or any misgiving or any hesitetancy whatsoever, being absolutely sure that that was not the case and making that statement on the record, and to the United States Attorney's Office, nevertheless, the court is confronted by a request from the U.S. Attorney's Office to replace Miss Bailey in accordance with that categoric request on the part of the U.S. Attorney's Office, which I essentially, and in disagreement with, but, nevertheless, in an effort to make absolutely certain that was are not wasting everybody's time here and taking into account the remote possibility that in the instance that they have underlined and show all of this concern about could possibly be some basis for dealing with this case in some basis, even after the court made it absolutely clear as an officer of the United States, that I am convinced there is no basis whatsoever to discharge Miss Bailey. I am going to do that to simply go on with the trial of this

matter and get this matter resolved as far as the government is concerned, as far as the defendants are concerned, as far as the jury is concerned and everybody else involved is concerned. I'm not going to discharge any of the other two persons who say that they at least took a look at the article because, as far as I am concerned, that is even more ridiculous and I will not proceed in accordance with your request.

Mr. Mosca: Respectfully note our objection and urge the Motion for mistrial.

Mr. Capitelli: For everyone, I would object to the court's proceeding here. Think it taints the remaining defendants, and move for a mistrial on behalf of Doctor Canale.

The Court: It's denied.

(Whereupon Juror, Bailey entered the Courtroom.)

The Court: Miss Bailey yesterday I asked a couple of questions about the article in the newspaper. And concerning certain aspects of the case as it was mentioned in the newspaper. Did you in any way discuss my questioning of you with the other members of the jury?

Juror Bailey: Well, they asked me what you said. I told them that you asked about the paper.

(Transcript of proceedings December 6, 1984, p. 2, lines 17-25, p. 3, p. 4, lines 1-23, Appendix H).

It should be readily apparent that these blatant prejudicial comments to Ms. Bailey by Judge Beer tainted Ms. Bailey's ability to serve as a juror. Likewise, by sending Ms. Bailey back to the panel and allowing the discussion that took place between the remaining members of the jury and Ms. Bailey, Judge Beer had in effect tainted the entire jury panel. It's respectfully submitted that this is a "substantial issue of the type that calls into question the validity of the judgment".

5. Denial of Motion to Sever

Prior to trial the accused joined with co-defendant Dr. Natchez Morice in moving to sever themselves from their co-defendants. That motion was denied on November 15, 1984. On Saturday, December 1, 1984, two days before trial, Dr. Morice had an "emergency" hernia operation, which resulted in a severance being granted to Dr. Morice.

Dr. Canale, the only other defendant similarly situated, again specifically reurged that a severance be granted to allow him to be tried with Dr. Morice. That motion was denied. As a result, Dr. Canale was forced to trial with co-defendants against whom the evidence was much greater. The indictment was largely directed at another co-defendant, Joseph Robert Provenzano. A great deal of publicity surrounded the charges against Porvenzano which led to inherently prejudicial conditions for the co-defendants.

An indication of how substantial the severance issue could be in this case is the fact that Dr. Natchez Morice who was granted a severance because of the "emergency" hernia operation was found not-guilty by a jury of every count since his trial was not tainted by the publicity and unrelated evidence dealing with the other co-defendants, particularly Provenzano.

Other grounds for reversal exist and will be raised on appeal. The grounds presented herein, however, are sufficient to demonstrate that substantial issues of law or fact exist which would call into serious question the validity of the judgment itself. And if a finding in favor of these issues were made in favor of applicant, it would constitute sufficient prejudicial error to require reversal and a new trial.

II.

The Retroactive Application Of 18 U.S.C. 3143 Violates The Ex Post Facto Clause Of The United States Constitution.

Article I, clause 9 of the United States Constitution prohibits Congress from passing any "ex post facto" law. In *Weaver v. Graham,* 450 U.S. 22 (1981), the most recent ex post facto case decided by the United States Supreme Court, the court noted that two critical elements must be present in order for a criminal or penal law to be ex post facto:

1.) The law must apply to criminal acts occurring prior to its enactment, and

2.) The law must disadvantage the offender affected by it. 450 U.S. at 29.

In the instant case, the District Court applied 18 U.S.C. 3143, enacted on October 12, 1984, in deciding the Motion To Remain On Bond Pending Appeal brought by applicant in order to justify incarcerating applicant for criminal acts occurring in December of 1979 and February and March of 1981. It is clear that this constitutes a retroactive application of the statute. Therefore, the question of ex post facto status turns on whether the statute "disadvantages the offender affected by it".

The Supreme Court has repeatedly recognized that a purely procedural change in the law may not constitute an ex post facto violation even though the change disadvantages a criminal defendant. However, a superficially "procedural" change in the law which increases the punishment or imposes more onerous conditions on a defendant than those imposed on the date of the alleged offense does

constitute an ex post facto violation. *Hopt v. Utah,* 110 U.S. 574 (1884), *Weaver, supra.*

In the instant case it is clear that the retroactive application of 18 U.S.C. 3143 has effectively increased the punishment for the criminal acts alleged to have been committed by applicant. The new standard for bond on appeal is significantly more stringent than the former standard. Under the prior standard, once the accused demonstrated that he was not likely to flee or pose a danger to the community, the burden shifted to *the government* to show that the appeal by the accused was "frivolous". Under the new standard, *the accused* must show his appeal raises substantial issues of fact or law likely to result in a new trial or reversal. As interpreted by the District Court in the instant case, burden on the accused is to show that the trial judge has allowed reversible error to occur during the trial. As shown in part I of this argument, this is a virtually impossible burden to overcome, effectively destroying the right of a criminal defendant to remain on bond pending appeal. Therefore, a criminal defendant is now forced to begin serving his sentence immediately. The report of the Senate Judiciary Committee, contained in S. Rep. No. 98-225, 98th Cong., 2nd Sess., reprinted in 1984 U.S. Code Cong. & Ad. News, vol. 9A, confirms that the intent behind the new statute was to force a criminal defendant to immediately begin serving his sentence following conviction. The report states that:

> ". . . release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years." Id. at p. 29.

From the above statement of Congressional intent, it is clear that *Congress* believes the new statute to constitute an increase in punishment since the statute is alleged to increase the deterrent effect of the criminal law. In another district court case considering the provisions of 18 U.S.C. 1343, the Honorable District Judge Susan Getzendanner reached the same conclusion. In *U.S. v. Cirrincione, et al,* 82 CR 778 (N.D. Ill. 1/16/85), the District Court stated that:

> "By viewing the restrictions on release pending appeal to be a deterrent to crime, Congress must have concluded that a sentence which commences immediately upon conviction is some how more severe than a sentence which commences only after appeal." Id. at pp. 16-17.

The District Court went on to hold that the provisions of 18 U.S.C. 3143 could not constitutionally be applied to offenses committed prior to October 12, 1984 without offending the ex post facto clause. The Court held that:

> ". . . the Bail Reform Act's standards for release pending appeal cannot be applied to offenses committed before October 12, 1984, without offending the ex post facto clause. The apparent purposes of the Act — to elminate dilatory appeals and to help deter crime — are laudatory ones, but may not be used to enhance punishment of those who committed unlawful acts in possible reliance on previous standards." Id. at p. 21.

The Court went on to apply the standards of former 18 U.S.C. 3148 in deciding the rights of the defendants to remain on bond pending appeal.

Other District Courts have similarly found that to apply the provisions of 18 U.S.C. 3143 retroactively would be unconstitutional. *U.S. v. Dante Gill, et al,* 84-67 (W.D. Pa. 1984); *U.S. v. Mitchell,* C.R. 83-0130 (N.D. Ca. 1/4/85).

In *Mitchell,* the Court held that the provisions of the Bail Reform Act of 1984 could not be applied to individuals who had already been admitted to bail under the provisions of the Bail Reform Act of 1966. The rationale underlying this decision is clear. It is illogical, unreasonable, and discriminatory to apply different standards for release on bail to same defendant for the same offense. This reasoning is especially applicable to the instant case since Dr. Canale had been out on bail for a period of over *ten months* prior to his bail being revoked by the District Court.

Denial of bail on appeal cannot rationally be viewed as simply a matter of procedure. Incarceration severely impairs the ability of an individual to effectively assist his counsel on appeal. The impact on the family and business endeavors of the accused is obvious. Most importantly, perhaps, the possibility of an unjust incarceration is increased by frightening proportions. It is easy to envision a situation where an accused man could serve most or all of a sentence of imprisonment only to have his conviction set aside on appeal. In the instant case, the transcript of the trial will not be available until May 15, 1985. Taking into account the various appellate delays, it is apparent that Dr. Canale will serve a substantial portion, if not all, of his sentence prior to a final judgment being rendered on appeal.

Wherefore, this Honorable Court should issue a writ of mandamus to the United States District Court for the Eastern District of Louisiana, ordering that the Motion for applicant for bond pending appeal be reconsidered under the standards applicable before the 1984 amendments.

———o———

CONCLUSION

The District Court and the Court of Appeals both applied an unconstitutional interpretation of 18 U.S.C. 3143 to the case at hand resulting in the violation of applicant's rights and loss of liberty. The Court applied standard was one that required the trial judge to admit that there is an issue "likely to result in reversal or an order for a new trial" before granting bond on appeal. This standard violates both the Fifth and Eighth Amendments to the United States Constitution.

WHEREFORE, it is respectfully requested that this Honorable Court should issue writs to the United States District Court for the Eastern District of Louisiana, Section "M", ordering the District Court to reconsider the Motion to Remain on Bond Pending Appeal through the proper interpretation of 18 U.S.C. 3143.

Alternatively, it is requested that this Honorable Court exercise its own jurisdiction and considering the factors set forth above, grant applicant bond pending appeal.

In the further alternative, should the Court find the interpretation of 18 U.S.C. 3143 by the District Court and the Fifth Circuit was correct it should be of no force and/or effect as unconstitutional for violating the Fifth Amendment, Eighth Amendment and/or the Ex Post Facto Clause of the United States Constitution.

Respectfully submitted,

/s/ Ralph Capitelli

VERIFICATION

I, Ralph Capitelli, am a member of the Bar of the Supreme Court of the United States and the attorney of record for Petitioner in the above entitled matter.

I have read the foregoing Petition and know the contents thereof.

I declare under penalty of perjury under the laws of the State of Louisiana that the foregoing is true and correct. Executed on April 25, 1985 at New Orleans, Louisiana.

/s/ RALPH CAPITELLI

Attorney for Petitioner

PARISH OF ORLEANS
STATE OF LOUISIANA

On April 25, 1985, before me the undersigned, a Notary Public in and for said state, personally appeared Ralph Capitelli, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.

/s/ T. CAREY WICKER, III
Notary Public for the Parish
of Orleans, State of Louisiana

(SEAL)

APPENDIX

Appendix "A" Fifth Circuit's opinion denying Dr. Salvador Canale's Application for Rehearing of Order denying Writ of Mandamus, Bail Pending Appeal, and Stay of Incarceration Pending further proceedings.

Appendix "B" Minute Entry of 1/2/85 in *U.S. v. Provenzano, et al,* No. 84-103, Section "M" U.S. D.C. Eastern District of Louisiana signifying the Court's intention to apply the provisions of the new Bail Reform Act of 1984.

Appendix "C" Notice of Appeal filed by Dr. Canale in connection with *U.S. v. Provenzano,* Id.

Appendix "D" Minute Entry of 1/25/85 denying all defendants' Motion to Remain on Bond Pending Appeal.

Appendix "E" District Court's denial of Dr. Canale's Motion to Stay Incarceration of 1/30/85 in connection with *U.S. v. Provenzano,* Id.

Appendix "F" Fifth Circuit's denial on 2/4/85 of Dr. Canale's Petitions for Writ of Mandamus, Application for Bond Pending Appeal, and Motion to Stay Incarceration.

Appendix "G" Transcript of the dismissal of Juror Bailey during the trial of *U.S. v. Provenzano,* Id., on 12/6/84.

I certify that all of the appendices attached to the Petition for Writ of Certiorari filed herein are true copies of what they purport to be.

/s/ Ralph Capitelli

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3052

IN RE:

DR. SALVADOR CANALE,

Petitioner.

Appeal from the United States District Court for the Eastern District of Louisiana

(Filed March 28, 1985)

Before GEE, JOHNSON and DAVIS, Circuit Judges.

BY THE COURT:

Petitioner Salvador Canale applies for rehearing of our order denying writ of mandamus, bail pending appeal, and stay of incarceration pending further proceedings.

His first claim is that applying the new Bail Reform Act, 18 U.S.C. § 3143, to him is unconstitutional as ex post facto because the offenses of which he has been convicted were committed before the new act was passed. This is not an open question in our Circuit, since we have held that the new act is merely procedural and does not alter substantive rights. United States v. Crabtree, — F.2d — (5th Cir. 1985), Sl. Op. 2859.

He next asserts that the trial court misconstrued the new act's requirement that he demonstrate that his appeal "raises a substantial question of fact or law likely to result in reversal or an order for a new trial." 18 U.S.C. § 3143(b) (2). His claim is that the trial court's state-

ments at his hearing indicate that the court believed it could not permit him to remain at large without admitting that it had committed reversible error during his trial. We agree that such is not the test and align ourselves generally with the views of the Third and Ninth Circuits, expressed in United States v. Miller, — F.2d — (3d Cir. Jan. 18, 1985, No. 84-1733), and United States v. Handy, — F.2d — (9th Cir. Feb. 20, 1985, No. 85-3001): the statutory reference is to a presence in the case of at least one fairly debatable or substantial issue of the type that calls in serious question the correctness of the judgment of conviction. We have carefully reviewed the remarks of the trial court to which petitioner directs our attention and are persuaded that this is the standard which it applied, not some notion that the statute required a confession of error.[1]

IT IS ORDERED, therefore, that petitioner's application for rehearing of this Court's order dated February 4, 1985, denying the petition for writ of mandamus, denying the alternative application for bail pending appeal, and denying the motion to stay the district court order to surrender himself for incarceration pending disposition of petition for writ of mandamus, is DENIED.

IT IS FURTHER ORDERED that petitioner's alternative motion to stay imposition of incarceration pending determination of petition of certiorari, appeal, and motion to remain on bond pending appeal by the United States Supreme Court, is DENIED.

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[1] Included are such observations, as to one question, that "some reviewing court might have to take a look at that" and "my opinion of it was that the government's position was more likely correct than incorrect. . . ."

APPENDIX B

MINUTE ENTRY
BEER, J.
JANUARY 2, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
JOSEPH ROBERT PROVENZANO, ET AL

CRIMINAL ACTION
NUMBER 84-103
SECTION M

(Filed January 2, 1985)

Counsel for all parties are hereby given notice of certain applicable provisions of the Comprehensive Crime Control Act of 1984, and specifically the provision for "Release or Detention Pending Appeal By The Defendant" incorporated therein.

Prior to this revision, 18 U.S.C. § 3148 provided that the conditions for release of a person who had been convicted of an offense and had filed an appeal were the same as those for release in noncapital cases prior to trial, set forth in 18 U.S.C. § 3146, except where a risk of flight or danger appeared to exist and the Court had reason to believe that no one or more conditions of release would reasonably assure that the person would not flee or pose a danger to any other person in the community, *or* where it appeared that an appeal was "frivolous or taken for delay," in which case the defendant could be ordered detained. 18 U.S.C. § 3148 (supp. 1984), *repealed by* Com-

prehensive Crime Control Act of 1984, Title II, Chapter I, Section 202 (Public Law No. 98-473).

The new provision provides in pertinent part:

> (b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT. The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—
>
> > (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c); and (2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact [likely to result in reversal or an order for a new trial.]
>
> If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

18 U.S.C. § 3143, *found in* Comprehensive Crime Control Act of 1984, Title II, Chapter I, Section 202 (Public Law No. 98-473). Section 3142, referred to in the above provision, concerns the legal standards for release or detention of a defendant pending trial.

I believe that this represents a compelling change from the prior applicable provisions. Counsel must be guided by these standards in preparing post-trial and pre-sentencing motions since the Court fully intends to follow them as written.

/s/ Peter Beer

COUNSEL OF RECORD

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
versus
DR. SALVADOR CANALE, et al

CRIMINAL DOCKET
NO. 84-103
SECTION "M"

NOTICE OF APPEAL

(Filed January 23, 1985)

Defendant, Dr. Salvador Canale, hereby informs this Honorable Court that he is aggrieved by the conviction and sentence rendered against him in this matter and intends to appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Ralph Capitelli
Capitelli, Bencomo & Wicker
600 Julia Street
New Orleans, Louisiana 70130
Telephone: (504) 525-0720

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been hand delivered to opposing counsel this 22nd day of January, 1985.

/s/ Ralph Capitelli

APPENDIX D

MINUTE ENTRY
BEER, J.
JANUARY 25, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION
NUMBER 84-103
SECTION M

UNITED STATES OF AMERICA
VERSUS
JOSEPH ROBERT PROVENZANO, ET AL

(Filed January 25, 1985)

Before the Court, by written motion and, in some instances, oral motion of counsel for various defendants, is a consideration of the question of detaining the defendants pending appeal.

All defendants before the Court in these proceedings (except defendant Provenzano, who has already commenced serving a term of imprisonment) are to self-surrender at the institution where they will serve their prison sentence by noon on February 6, 1985. Thus, time is a definite consideration in dealing with these motions.

The record in these proceedings will authenticate that defendants were ably and diligently represented and fairly tried in a trial that lasted approximately three weeks. At the conclusion of the evidence gathering portion of the trial, all defense counsel were accorded an extended period in which to make their closing arguments, after which

the jury was charged and then began their deliberations. Those deliberations continued over a period of four days. The jury seriously and conscientiously went about their work. The verdict rendered by them speaks clearly to the point that they carefully considered each count as to each defendant. Indeed, it may now be noted that I had some concern about the government's proof regarding one or two of the counts upon which the jury did, in fact, return not guilty verdicts. I did agree in all respects with their verdict as to each count involving each defendant.

Equally as diligent as the able defense counsel were the attorneys presenting the government's case. Though certain decisions which the government's attorneys made with respect to the method of presentation of their case may have been different than those which I might have made under the circumstances, I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal. Nor were there any substantial questions of law or fact which will result in an order for a new trial.

Squarely before me, then, is the matter of determining whether I am empowered to grant defendants' motions. I conclude that I am not. For, having made the factual and legal determination above referred to, I find the provisions of 18 U.S.C. § 3143 to be clear, unambiguous and straightforward.

The report of the Senate Judiciary Committee regarding the statute here involved includes a detailed discussion of the change brought about as a result of the Comprehensive Crime Control Act of 1984. See: S. Rep. No. 98-225, 98th Cong., 2nd Sess., *reprinted in* 1984 U. S. Code Cong. & Ad. News, Vol. 9A, p. 29.

The legislative history of the statute includes the following:

> "It has been held that although denial of bail after conviction is frequently justified, the current statute incorporates a presumption in favor of bail after conviction. It is the (sic)[1] presumption that the Committee wishes to eliminate in Section 3143."

The report further states that:

> "Once guilt of a crime has been established in a court of law, there is no reason to favor release pending . . . appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.
>
> Second, release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years." *Id.*

District courts similarly confronted seem to have split on whether they will or will not follow what I perceive to be a clear, unequivocal mandate from the Congress. For example, a memorandum opinion of Honorable Susan Getzendanner, United States District Judge for the Northern District of Illinois, reached an opposite result in *United States of America v. Biagio Cirrincione, et al,* No. 82-CR-778 (N.D. Ill., Jan. 16, 1985).

Judge Getzendanner reasons:

> "The apparent purposes of the Act—to eliminate dilatory appeals and to help deter crime—are laudatory ones, but may not be used to enhance punishment of

---

[1] I believe this word was intended to be "this" instead of "the."

> those who committed unlawful acts in possible reliance on previous standards." Slip op. at 21.

I am in disagreement with this rationale and with the conclusion that the congressional mandate embodied in the Comprehensive Crime Control Act of 1984 is being "used to enhance punishment." Here there is no enhancement of punishment. Congress has simply spoken clearly to the point at issue. They have revised the manner in which convicted defendants will be dealt with after conviction, and their mandate is to be followed on the basis of its fair, reasonable and sensible construction compatible with the apparent object and plain intention as expressed therein.

There is no constitutional guarantee of bail pending appeal. See *United States v. Baca,* 444 F.2d 1292 (10th Cir.), *cert. denied,* 404 U.S. 979 (1971). Furthermore, Judge Getzendanner, apparently acknowledging this, has observed:

> "To the extent that the post-conviction bail provision of the new Act is regulatory and not punitive, it necessarily falls outside the prohibitions of the ex post facto clause: . . . ."

However, she determines that:

> " . . . Congress must have concluded that a sentence which commences immediately upon conviction is somehow more severe than a sentence which commences only after appeal." Slip op. at 15-17.

I believe this to be an inaccurate observation. Congress has done no more (and no less) than to conclude, in their legislative wisdom, that judicial officers shall order a person who has been found guilty of an offense and sentenced to a term of imprisonment and who has filed an appeal (or a petition for a writ of certiorari) be detained unless

the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial. Having here made the determination that such is not here the case, defendants' motions for bail pending appeal must be denied.

/s/ Peter Beer

COUNSEL OF RECORD

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION
No. 84-103
SECTION "M"

UNITED STATES
VERSUS
Dr. SALVADOR CANALE

MOTION FOR STAY ORDER

(Filed January 29, 1985)

Dr. Salvador Canale, defendant in the captioned action, appearing through the undersigned counsel, hereby informs this Honorable Court that he is aggrieved by this Court's decision of January 25, 1985, denying his Motion to be Released on Bond Pending Appeal and intents to seek supervisory writs from the United States Court of Appeals for the Fifth Circuit.

It is therefore moved that this Court grant Dr. Canale a stay of this Court's order that he surrender himself for incarceration on February 6, 1985, pending resolution of this matter by the Court of Appeals.

Respestfully submitted,

/s/ Ralph Capitelli
Capitelli, Bencomo & Wicker
600 Julia Street
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Counsel for Dr. Salvador Canale

ORDER

It is hereby ordered that the previous order of this Court directing Dr. Salvador Canale to report for incarceration on February 6, 1985, is hereby stayed pending resolution of this matter by the Court of Appeals.

New Orleans, Louisiana, this — day of ———, 1985.

/s/ Peter Beer
United States Judge

DENIED 1/30/85

CERTIFICATE

I hereby certify that a copy of the foregoing motion has been served upon the Government by hand delivery and by counsel for all other parties by mail.

/s/ John H. Craft

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3052

CR 84-103-M

IN RE:

DR. SALVADOR CANALE,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Louisiana

(Filed February 4, 1985)

Before GEE, JOHNSON and DAVIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that petitioner's alternative application for bail pending appeal if DENIED.

IT IS FURTHER ORDERED that petitioner's motion to stay the order of the United States District Court for the Eastern District of Louisiana to surrender himself for incarceration on February 6, 1985, pending disposition of the petition for writ of mandamus is DENIED.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

CRIMINAL ACTION
NUMBER 84-103
SECTION M

UNITED STATES OF AMERICA
VERSUS
JOSEPH ROBERT PROVENZANO

Transcript of the Court's questioning of three jurors pertaining to an article in the newspaper, held in open court, Wednesday, December 5, 1984, during the trial in the above-mentioned case, before the Honorable Peter Beer, United States District Judge.

Reported By: Rhonda J. Ballard, Official Court Reporter

You may even notice yourself some of them have reference to the fact that this matter is in trial, something on the radio, something in the paper. It was called to my attention, though I didn't see it myself, there was an article in this morning's Times Picayune about this trial. Which is quite in order. The press has a perfect right to be present in the courtroom, just like any other citizen. However, the newspaper article makes reference with respect to Mr. Provenzano, of another case that had been before this court. And if any of you all did, by chance, see the article or read it, I want to say to you that any reference to any other proceeding is so totally irrelevant and immaterial to what we are dealing with here. And I want to instruct you in the strongest possible terms to

disregard any reference to any other event or events as they have to do either with Mr. Provenzano, or any other defendant in the case. The obvious purpose of my instructions to you on that point is clear, the only thing that this jury is concerned with is a determinatinn of the guilt or innocence of the defendants before this court, with respect to these charges, in these proceedings, at this time. And it would have been quite in order for defense counsel to object if anyone in the proceedings sought to make reference to any other event or events involving any of these defendants that is not material to these proceedings. It isn't before us. And I direct you in the strongest possible way to disregard any reference wherever it may be, in the newspaper, television, radio, et cetera, with respect to any other alleged, or proposed, or contended activities on the part of any of these defendants in every respect. Because that is not what we're dealing with here. What we're dealing with here is the charge that the grand jury returned that I read to you carefully yesterday and I noticed that you all listened to carefully yesterday. And that is all. And basically, what the jury has to decide in this case, is whether any of these defendants are guilty of any of these charges, the ones that we discussed yesterday. And nothing else. Indeed, the jury doesn't even have to be concerned in any respect with regard to any dealing with that finding if there is, whatever the finding is. The court will deal with that finding itself. So, what you all have got to concentrate on and I know you will, is simply the question of guilt or innocence of these defendants as they are involved with the charges that have been brought against them by The United States. That is all. In this court proceeding, before us here in this courtroom. And

I know that you will do that. I can sense in my eye contact with you and just my own appraisal of your togetherness as far as operating as a jury is concerned, that you're going to follow my request and my direction that you deal with it on that basis. And I know that you will. Let me say to you the best way of avoiding any consideration of what may be carried in the press when, I say the press, I mean the whole area of press activities, radio, television, newspaper, magazines, whatever. Try to avoid concerning yourself with any articles or what not. Because all it could possibly be in so far as what is going on here is concerned, is report of those events which you all are more privy to than anybody. You all know better than anybody what is going on here. Really, the best way to avoid any possibilities of having anything that should not be considered by you in anyway called to your attentions is just to flip it off if something comes on or disregard it, not read it, if it shows up in the paper. I don't mean to demean those sources of information. I just mean that that is probably the fairest thing you can do in the circumstances. But most important, of course, is to follow my very strong admonition to you not to in any way be effected by, or consider, or even take into account other events involving any of these defendants as they have to do with other contentions, other findings in other proceedings whatsoever. That is the only way to live up to your oath, which is that you will give the defendants a fair and impartial trial and, of course, the governm nt, the same thing. And consistent with that fairness and impariality is that you regard only what you hear and perceive here in this courtroom in these proceedings. And I know you will do that. Okay, let's go right ahead, then call your next witness.

Mr. Moore: Could we have a sidebar conference, if the court please?

(Whereupon a bench conference was held outside the hearing of the jury on the record.)

Mr. Moore: Your Honor, what concerns the government at this time is if any of the jurors could have read the article. We suggest that the court should probably propound the question as to whether or not anyone of them have read the article. Because the court kind of mentioned to them there was another case. And we think that needs to be clarified at this time, that if anyone has, in fact, read the article. That the court should probably inquire whether or not that would effect them in so far as any judgment of this case.

Mr. Mosca: This basically is what I asked for initially, and at this time I would like to ask that if you so deem it appropriate you would ask the juror to raise their hand and take them individually so we don't taint the whole jury if that is ameanable to you.

The Court: I'll do that.

(Whereupon, the discussion at the bench was concluded.)

The Court: Kind of along the lines of the article in the paper, let me ask if any of you did, in fact, read that article. In the Times Picayune, this morning? Let me just ask your name, please.

Juror, Bailey: Valerie Bailey.

Juror, Volintine: Donna Volintine.

Juror, Meidera: Jean Meidera.

The Court: Okay. I think perhaps the easiest way to deal with this would be to ask—I know this is a slight inconvenience to you all—let me ask that the jury step out for just a moment and Miss Bailey, would you remain for just a second after the jury steps out.

(Whereupon the jury exited the courtroom.)

The Court: I'm going to ask you some questions. I want to check with you to satisfactory myself of a couple of points. Did you recall if you noticed in the article, the article made reference to another trial, another conviction with respect to Mr. Provenzano.

Juror, Bailey: I don't remember.

The Court: You don't remember. If indeed it did, and you happened to have read it, would that in any way affect your ability to fairly and impartially hear and decide this case?

Juror, Bailey: No, it won't.

The Court: Any other questions.

Mr. Fanning: I'd like to ask the juror if she discussed the article with anyone else, including any of the jury.

The Court: Did you discuss that article with any other members of the jury.

Juror, Bailey: No, I did not.

The Court: Thank you, Miss Bailey, would you ask Miss Volintine if she would step in a minute.

(Whereupon, Juror, Bailey, exited the courtroom.)

Mr. Capitelli: Before the next juror comes in, I would like to ask the court not to reference the point in the article. I think that has an effect on all the people involved.

The Court: I don't understand what you mean.

Mr. Capitelli: I withdraw it.

Ms. Bitzer:

We agree with that. I understand what he is saying, that the Court would not pinpoint the specific case, more particularly, whether or not there was a conviction, a matter of fact. Just whether or not they read it, if it would effect it would have on them.

The Court: I am going to try to do this the way all of you want to. I don't have the forum in prospective as much as I do the necessity of a fair trial. And as far as I am concerned, the verbage that somehow, apparently effects everyone's thinking, because the Fifth Circuit pronounces some existing attitude of the manner these things have to be addressed, doesn't concern me as much as being sure I satisfactory myself as a United States District Judge these people are going to have a fair trial at the hands of this jury, than some rote adherance to some specific verbage announced by some panel of the court of appeal. Go ahead call the next juror.

(Whereupon, Juror, Volintine entered the courtroom.)

The Court: Consistent with your response to the court, with respect to having read the article that appeared in the Times Picayune this morning, did you read the article in its entirety.

Juror, Volintine: No, I just glanced through it.

The Court: Let me simply ask you this: Would the discussion of the article, what is included in the article, in any way effect your ability to fairly and impartially hear and decide the issues in this case.

Juror, Volintine: No, sir. The few facts that I did see were facts that I had heard here yesterday. And my thought was that whoever wrote that was pretty accurate. And I put it aside and had my coffee I learned from yesterday that I am not going to make my mind up until I heard everything.

The Court: Couldn't do any better than that.

The Court: Anybody have any other questions.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

CRIMINAL ACTION
NUMBER 84-103
SECTION M

UNITED STATES OF AMERICA
VERSUS
JOSEPH ROBERT PROVENZANO, ET AL.

Transcript of the dismissal of Juror, Bailey, during the trial of the matter, before the Honorable Peter Beer, United States District Judge, Thursday, December 6, 1984. Reported By: Rhonda J. Ballard, Official Court Reporter

P-R-O-C-E-E-D-I-N-G-S

(Dismissal of Juror, Bailey)

Thursday, December 6, 1984

Mr. Mosca: On behalf of Mr. Provenzano, this motion is made in connection with yesterday's proceedings. And we would just ask the court to consider if it's going to replace one of the jurors that it consider just replacing the jurors who read the articles. We have enough alternates, it seems to me, that that would—

The Court: Although it is perfectly obvious it had no effect on them whatsoever, as is the case with Mrs. Bailey, I want to say on the record, as far as this whole proceeding is concerned, I have absolutely doubt that the proceeding that the court followed with respect to Mrs. Bailey and the other two jurors is entirely in order, it

was perfectly clear to me, absolutely categorically clear on the face of the discussion with Miss Bailey, there was absolutely no basis whatsoever for her to be excused. It was positively clear to me that she had not, in any way, been influenced by the article. Indeed, it was absolutely clear that that was not the case, that it had no effect on her whatsoever, and yet I am now, confronted with a request by the U.S. Attorney's Office to remove Mrs. Bailey from the jury. Now, because of the apparent concern on the part of the U.S. Attorney's Office with respect to this one particular juror or actually, if the truth be known, the concern from the U.S. Attorney's Office that some appellate panel might take umberage at the process that the court instituted as a United States District Judge concerned not with the rote business of verbage but with the actual determination of whether or not there had been any possibility of any prejudge whatsoever of any misgiving or any hesitancy whatsoever, being absolutely sure that that was not the case and making that statement on the record, and to the United States Atorney's Office, nevertheless, the court is confronted by a request from the U.S. Attorney's Office to replace Miss Bailey in accordance with that categoric request on the part of the U.S. Attorney's Office, which I essentially, am in disagreement with, but, nevertheless, in an effort to make absolutely certain that we are not wasting everybody's time here and taking into account the remote possibility that in the instance that they have underlined and show all of this concern about could possibly be some basis for dealing with this case in some basis, even after the court made it absolutely clear as an officer of the United States, that I am convinced there is no basis whatsoever to discharge

Miss Bailey. I am going to do that to simply go on with the trial of this matter and get this matter resolved as far as the government is concerned, as far as the defendants are concerned, as far as the jury is concerned and everybody else involved is concerned. I'm not going to discharge any of the other two persons who say that they at least took a look at the article because, as far as I am concerned, that is even more ridiculous and I will not proceed in accordance with your request.

Mr. Mosca: Respectfully note our objection and urge the motion for mistrial.

Mr. Capitelli: For everyone, I would object to the court's proceeding here. Think it taints the remaining defendants, and move for a mistrial on behalf of Doctor Canale.

The Court: It's denied.

(Whereupon Juror, Bailey, entered the courtroom.)

The Court: Miss Bailey yesterday I asked a couple of questions about the article in the newspaper. And concerning certain aspects of the case as it was mentioned in the newspaper. Did you in any way discuss my questioning of you with the other members of the jury?

Juror, Bailey: Well, they asked me what you said. I told them that you asked about the paper.

The Court: That's all, that I asked about the article in the paper?

(3) (2)

Nos. 84-1718 and 84-1760

Office-Supreme Court, U.S.
FILED
JUN 13 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

HUBERT T. CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

SALVADOR CANALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10/28

QUESTIONS PRESENTED

1. Whether the district court applied the wrong standard in denying petitioners' applications for post-conviction bail pending appeal.

2. Whether application of the new statutory standard for bail pending appeal to petitioners, who committed the crimes for which they have been convicted prior to passage of the Act but who were sentenced after its enactment, violates the Ex Post Facto Clause of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1718

HUBERT T. CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1760

SALVADOR CANALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 84-1718 (84-1718 Pet. App. A1-A5) is reported at 754 F.2d 1200. The opinion of the court of appeals in No. 84-1760 (84-1760 Pet. App. 2-3) is not yet reported. The opinion of the district court in both cases (Pet. App. 7-11) is unreported.[1]

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 84-1760.

JURISDICTION

The order of the court of appeals denying bail pending appeal in No. 84-1718 was entered on February 22, 1985. The petition for a writ of certiorari was filed in that case on April 22, 1985. The order of the court of appeals denying bail pending appeal in No. 84-1760 was entered on February 4, 1985. A petition for rehearing was denied on March 28, 1985. The petition for a writ of certiorari was filed in that case on May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Comprehensive Crime Control Act of 1984, 18 U.S.C. 3143,[2] states in pertinent part:

> (b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT. — The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds —
>
> (l) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

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[2]The Act is Pub. L. No. 98-473, 98 Stat. 1979 *et seq.* Although its provisions are too new to appear in the current edition of the United States Code, we cite to the Code, as amended by the Act, for ease of reference. The revised 18 U.S.C. 3143(b) appears at 98 Stat. 1981.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisana, petitioners were convicted of racketeering, in violation of 18 U.S.C. 1962, based on criminal acts occurring between 1979 and 1981. Petitioner Crabtree was sentenced to concurrent three and one-half year terms of imprisonment on each of two counts and a total fine of $25,000. Petitioner Canale was sentenced to two and one-half years' imprisonment on one count and a fine of $15,000. On a second count he was fined an additional $15,000 and sentenced to five years' imprisonment, which was suspended in favor of three years' probation. The district court, applying the new standard governing bail pending appeal prescribed by the Comprehensive Crime Control Act of 1984, 18 U.S.C. 3143(b), denied petitioners' applications for release pending appeal. By separate orders the court of appeals sustained that ruling in each case.

1. Following petitioners' convictions, in an order dated January 2, 1985 (Pet. App. 4-5), the district court alerted counsel to the applicability in these cases of the provisions of the Comprehensive Crime Control Act of 1984 relating to release pending appeal. Thereafter, on January 23, 1985, petitioners each filed a motion for release on bond pending appeal. In his motion, petitioner Crabtree argued that he intended to raise five "serious issues" on appeal,[3] that the appeal was not frivolous or taken for delay, and that he was not likely to flee the jurisdiction pending appeal (84-1718 Pet. 4). Petitioner Canale asserted in his motion that application to him of the Bail Reform Act of 1984 constituted a violation of the Ex Post Facto Clause of the Constitution. If

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[3]They are: (1) the temporary presence on the jury panel of a juror allegedly tainted by knowledge of a co-defendant's prior conviction; (2) lack of evidence of two separate predicate acts; (3) error in the district court's ruling on "*James*" motions; (4) impropriety of government counsel's rebuttal argument; and (5) inadmissibility of tape recordings of petitioner's wife. See 84-1718 Pet. App. A7.

the Act were held applicable he argued that he should be released on bond pending appeal because (1) he was not likely to flee or pose any danger to the community, (2) the appeal was not for purposes of delay, and (3) he raised substantial issues likely to result in reversal.[4]

Following a hearing on January 23, 1985, the district court denied petitioners' motions for release on bond pending appeal on January 25, 1985 (Pet. App. 7-11), stating (*id.* at 8) that it had "no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal" and that there were no "substantial questions of law or fact which will result in an order for a new trial." The district court held further that the application of the new bail standards to petitioners did not violate the Ex Post Facto Clause of the Constitution because the provisions of the Act were regulatory in nature and did not effect an enhancement of punishment (Pet. App. 10).

2. The court of appeals, acting through Chief Judge Clark sitting individually, denied Crabtree's application for release pending appeal on February 22, 1985 (84-1718 Pet. App. A1-A5).[5] Judge Clark found that Crabtree had "failed to carry the burden imposed on him [by 18 U.S.C. 3143(b)] to show that his appeal is likely to result in reversal or a new trial order" (84-1718 Pet. App. A3) and that the application

---

[4]Canale indicated his intention to raise the following matters on appeal: (1) denial of his motion to dismiss indictment; (2) denial of a motion in limine; (3) prosecutorial misconduct; (4) prejudicial comments made by the court; and (5) denial of a motion to sever. See 84-1760 Pet. 18-25.

[5]Crabtree applied to Chief Judge Clark "as a judicial officer authorized to order release from detention pending appeal under 18 U.S.C. § 3141 to allow him to retain his bail status pending appeal of the district court's ruling on his application" and the court of appeals' "ruling on his appeal from his conviction and sentence" (84-1718 Pet. App. A2).

of the Act to him did not violate the Ex Post Facto Clause. Judge Clark found it unnecessary to reach the question whether Crabtree had established, as required by the amended 18 U.S.C. 3143(b), that his appeal was not taken for purposes of delay and raised substantial issues. Given his failure to present a transcript of the proceedings below, the court found that Crabtree had failed "to carry the burden imposed on him to show that his appeal is likely to result in reversal or a new trial order" (84-1718 Pet. App. A3). Judge Clark observed that "Crabtree acknowledges that the issue he raises as to improper argument of counsel must depend on an examination of the transcript," while the remaining issues raised in his brief are discussed in factual terms "without record support" (*ibid.*).[6] He noted that unlike the district court, which had denied Crabtree's application for bail pending appeal in the first instance and which was conversant with the contents of the record pertinent to Crabtree's claims, the court of appeals was in no position to undertake "any meaningful review or independent reconsideration" absent "a proper transcript or stipulated factual record" (84-1718 Pet. App. A4). Judge Clark made clear that his ruling was without prejudice to "what a subsequent judicial officer or panel of this court might rule" on any issue underlying a renewed request for relief supported by an appropriate record (*ibid.*).

Judge Clark did reach and reject Crabtree's claim that the application of the new standard for bail pending appeal to his case violated the Ex Post Facto Clause. The court determined that the changes in standards for bail pending appeal effected in 1984 were procedural in nature and did

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[6]Given that no transcripts accompanied the application, Judge Clark reasoned that "[r]egardless of whether this application should be considered as a review of the action of the district judge and, if so, whether the proper standard of review is abuse of discretion or the clearly erroneous test, or whether the application is addressed to me for independent action, I must refuse relief" (84-1718 Pet. App. A3).

not alter any substantial right, increase punishment, or change the ingredients of the offense or the facts necessary to establish guilt (84-1718 Pet. App. A4-A5).

3. Petitioner Canale filed a petition for writ of mandamus with the court of appeals, alternatively requesting bail pending appeal from the court of appeals or a stay of the district court's order. On February 4, 1985, a panel of the court of appeals denied the requested relief without opinion (Pet. App. 14). Thereafter, Canale applied for rehearing of the order of the court of appeals. On March 28, 1985, a panel of that court entered an opinion denying all relief requested by Canale (Pet. App. 2-3).

The court of appeals rejected Canale's assertion that the district court "misconstrued the new act's requirement that he demonstrate that his appeal 'raises a substantial question of fact or law likely to result in reversal or an order for a new trial' " (Pet. App. 2). Based upon a "careful[] review[]" of the remarks of the district court, the court of appeals rejected Canale's contention that the district court had erroneously "believed it could not permit him to remain at large without admitting that it had committed reversible error during his trial" (Pet. App. 3). Aligning itself "generally with the views of the Third and Ninth circuits" (citing *United States* v. *Miller*, 753 F.2d 19 (3d Cir. 1985), and *United States* v. *Handy*, 753 F.2d 1487 (9th Cir. 1985)), the court of appeals endorsed Canale's contention (also embraced by the government) that, in order to meet the requirement that an appeal raise "a substantial question," a defendant need not persuade the district court effectively to recognize that it had committed reversible error (Pet. App. 3). Rather, "the statutory reference is to a presence in the case of at least one fairly debatable or substantial issue of the type that calls in serious question the correctness of the judgment of conviction" (*ibid.*). Based upon its review of the district court's comments at the hearing of January 23, 1985, the court of appeals was persuaded that "this is the

standard which [the district court] applied," and "not some notion that the statute required a confession of error" (*ibid.*).

The court of appeals also rejected Canale's claim that the application of the Bail Reform Act violated the Ex Post Facto Clause (Pet. App. 2), citing the opinion in *Crabtree* as dispositive.

ARGUMENT

The petitions present two questions concerning the application of the new standards for bail pending appeal presented by the Comprehensive Crime Control Act of 1984. Neither has produced any material division of authority among the courts of appeals; indeed, the decisions below are supported by congruent decisions of many other circuits. Nor do the rulings below conflict with any decision of this Court. Further review is plainly unwarranted.

1. Petitioners argue that the application of the more stringent standard for bail pending appeal prescribed by the new Act "effectively increased the punishment for the criminal acts alleged to have been committed by applicant" (84-1760 Pet. 27; 84-1718 Pet. 15), and accordingly is violative of the Ex Post Facto Clause of the Constitution. The court of appeals rejected this claim in *Crabtree* (84-1718 Pet. App. A4-A5) and adhered to that view in *Canale* (Pet. App. 2).

All of the courts of appeals that have considered this question following enactment of the new bail standards have reached the same conclusion as the court below. Thus, in addition to the decisions of the court below, challenges to the applicability of the new bail Act under the Ex Post Facto Clause have to date been rejected in *United States* v. *Miller*, 753 F.2d 19, 21 (3d Cir. 1985), *United States* v. *Molt*, 758 F.2d 1198 (7th Cir. 1985), *United States* v. *Coulombe*, No. 84-2430 (8th Cir. May 1, 1985), slip op. 13,

United States v. *Affleck*, No. 85-1009 (10th Cir. May 24, 1985), slip op. 9-16, and *United States* v. *Ballone*, No. 85-3171 (11th Cir. May 24, 1985). For their challenge to this consensus view petitioners rely primarily upon district court rulings that have by now been rejected in their respective circuits. See 84-1760 Pet. 28; 84-1718 Pet. 17.[7] There is no reason for further review of the ex post facto issue. The uniform view of the courts of appeals is not inconsistent with any decision of this Court. And while the change in bail standards may work against the interest of defendants, this is not a sufficient indication that the statutory change is impermissibly retroactive under the Constitution. See *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977); *Portley* v. *Grossman*, 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice). The change in the standard for bail pending appeal does not change the "quantum of punishment attached to the crime" (*Dobbert*, 432 U.S. at 294); it merely alters the likelihood that a defendant convicted of a crime will begin serving his assigned sentence (the length of which is not altered) at an early date.

2. Petitioners' remaining argument (84-1760 Pet. 10-15; 84-1718 Pet. 6-11) is that the standard applied by *the district court* to determine their eligibility for release pending appeal is inconsistent with decisions of the Third and Ninth Circuits. This contention also warrants no further review.

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[7] All but one of the district court rulings cited by petitioners have been overruled by subsequent holdings of their respective circuits. The sole exception is *United States* v. *Mitchell*, No. CR-83-0130 (N.D. Cal. Jan. 4, 1985). However, contrary to petitioner Canale's suggestion (84-1760 Pet. 28), *Mitchell* is plainly inapposite. The court there expressly held that its decision "does not reach the ex post facto issue or the constitutional challenges" to the Act (slip op. 2). Rather, the district court construed the *pre-trial* detention provisions of the Act to be inapplicable to defendants already admitted to bail prior to passage of the Act. Neither petitioner in this case is similarly situated.

All of the courts of appeals that have interpreted the standard for bail pending appeal prescribed by amended 18 U.S.C. 3143(b)(2) to date have agreed that the new statute mandates a two part test. They agree that under the new Act a defendant must show, first, that a substantial question has been raised on appeal from the judgment of conviction, and second, that if decided in the defendant's favor, the issue raised would result in reversal of the conviction or an order for a new trial on all counts on which the defendant was sentenced and not merely some more limited other relief or a finding that any error was harmless.[8] *United States* v. *Randell*, No. 85-1150 (2d Cir. May 3, 1985); *United States* v. *Miller, supra*; *United States* v. *Polin*, No. 85-5009 (4th Cir. Mar. 4, 1985) (opinion of Murnaghan, J., sitting individually); *United States* v. *Valera-Elizondo*, No. 84-2715 (5th Cir. May 14, 1985); *United States* v. *Coulombe, supra*; *United States* v. *Handy*, No. 85-3001 (9th Cir. May 21, 1985) (amended opinion); *United States* v. *Giancola*, 754 F.2d 898 (11th Cir. 1985). Finally, while some variations exist in the formulations used to flesh out the "substantial question" prong of the test, all of the courts of appeals are in agreement that Congress significantly elevated the threshold over the level that prevailed under prior law, and, at the same time, that Congress did not limit bail pending appeal to cases in which the district court was willing to certify its own error by finding that reversal on appeal was more likely than not to ensue. The Fifth Circuit's opinion in *Valera-Elizondo, supra*, like its opinion in *Canale* (Pet. App. 3), makes clear that it joins in this consensus.

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[8]These two criteria are in addition to the requirement of 18 U.S.C. 3143(b)(1) that the defendant establish that he does not present an undue flight risk, or a danger to particular persons or the community if released.

Against this background, the only issue the petitions frame is whether the court of appeals erred in concluding that the district court had not applied a standard that would have required it to confess its own error in order to grant bail pending appeal.[9] This fact-bound issue, which turns entirely on the court of appeals' assessment of the district court's remarks at the hearing preceding its written opinion, assuredly lacks any continuing general importance. We note, moreover, that as to petitioner Crabtree, the court of appeals never even had occasion to interpret the district court's ruling. Rather Crabtree's application was rejected because of his procedural default, which made it impossible for the court of appeals to assess any material aspect of his claim. See pages 4-5, *supra*. Because of that default, and because the court of appeals held out to Crabtree the opportunity to seek relief anew on a proper record, further review is especially inappropriate in his case.

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[9]Neither petitioner directly raises the underlying question whether he is in fact entitled to bail under the standards applied by the courts of appeals generally. Each does, however, canvass briefly the issues he anticipates raising on appeal (84-1718 Pet. 11-14; 84-1760 Pet. 18-25). As noted in the text that follows, the court of appeals had no occasion even to consider whether the appellate issues identified by petitioner Crabtree satisfied the statutory standard for substantiality. The court of appeals necessarily did reject that contention as raised by petitioner Canale, although his argument in the court of appeals, like that presented in this Court, focused almost entirely on the ex post facto issue and the standard applied by the district court to assess the substantiality of his appeal. See Pet. App. 2-3. As in this Court, Canale merely set forth his factual assertions without citing any authority suggesting that his claims have legal merit. In the circumstances, there is no occasion for this Court to review the court of appeals' determination that Canale had not demonstrated that his underlying appeal was sufficiently meritorious to warrant his admission to bail pending appeal.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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